United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14,635

131

CHARLES C. GRIGG,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Bill Austin Services, Inc.
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EX. 3-3239

INDEX

JOINT APPENDIX

[Filed July 29, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled May 2, 1957, Sworn in on May 7, 1957

The United States of America	:	Criminal No. 693-57
v.	:	Grand Jury No. 517-57 530-57
Charles C. Grigg	:	509-57
Donald V. Sellers	:	
Carl F. Tavenner	:	Vio. 26 U. S. C. 4742 a, 4744a, 33 D. C. C. 702

The Grand Jury charges:

On or about April 4, 1957, within the District of Columbia, Charles C. Grigg, Donald V. Sellers and Carl F. Tavenner transferred about 44.0 grains of marihuana to James M. Harrigan, not in pursuance of a written order of said James M. Harrigan on a form issued for that purpose as provided by law.

SECOND COUNT:

On or about April 4, 1957, within the District of Columbia, Charles C. Grigg, Donald V. Sellers and Carl F. Tavenner, being transferees of marihuana required to pay the transfer tax imposed by Section 4741a, Title 26, United States Code, obtained about 44.0 grains of marihuana without having paid such tax.

THIRD COUNT:

On or about February 12, 1957, in the District of Columbia, Donald V. Sellers delivered a dangerous drug, that is, two capsules, each containing one and one half grains of secobarbital sodium, to James M. Harrigan a person not lawfully entitled to receive said drug.

FOURTH COUNT:

On or about February 13, 1957, within the District of Columbia, Donald V. Sellers delivered a dangerous drug, that is, two tablets, each containing ten milligrams of racemic amphetamine sulfate, to James M. Harrigan a person not lawfully

entitled to receive said drug.

FIFTH COUNT:

On or about February 25, 1957, within the District of Columbia, Carl F. Tavenner delivered a dangerous drug, that is, sixty tablets, each containing ten milligrams of racemic amphetamine sulfate, to James M. Harrigan a person not lawfully entitled to receive said drug.

SIXTH COUNT:

On or about March 26, 1957, within the District of Columbia, Carl F. Tavenner delivered a dangerous drug, that is, five tablets, each containing ten milligrams of racemic amphetamine sulfate, to James M. Harrigan a person not lawfully entitled to receive said drug.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ B. T. Castle

Foreman.

[Filed June 16, 1958] United States of America v. Charles C. Grigg

JUDGMENT AND COMMITMENT

On this 6th day of June, 1958, came the attorney for the Government and the defendant appeared in person and by counsel, John W. Brennan, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

VIOLATION OF THE FEDERAL NARCOTIC LAWS, as charged, in counts one and two, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Five (5) years on count one of the indictment; Twenty (20) months to Five (5) years on count two of the indictment said sentence imposed on count two to run concurrently with the sentence imposed on count one of the indictment.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward A. Tamm
United States District Judge

[Filed June 13, 1958] **ORDER**

UPON consideration of the Petition for Leave to Proceed on Appeal in Forma Pauperis, the Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs, and the Reporters Transcript if needed, and an oral motion to set bond in the sum of $1,000.00, having been heard in open Court,

IT IS, by the Court, this 13th day of June, 1958,

ORDERED: (1) That the defendant be and he hereby is granted leave to proceed on appeal without prepayment of costs; and,

(2) That an appeal bond in the sum of $1,000.00 be and it hereby is set for the defendant, Charles C. Grigg.

/s/ Edward A. Tamm
JUDGE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 THE UNITED STATES OF AMERICA :
vs. : Criminal Action No. 693-57
CHARLES C. GRIGG, :
CARL F. TAVENNER, :
Defendants. : Thursday, April 24, 1958

The above-entitled matter came on for trial before THE HONORABLE EDWARD A. TAMM, Judge, United States District Court for the District of Columbia, at 2:35 p.m.

APPEARANCES:

For the Government:

ARTHUR J. McLAUGHLIN, Assistant District Attorney

For the Defendants:

JOHN W. BRENNAN, Esquire

SAMUEL BOGORAD, Esquire

* * * * * * * * *

2 JAMES M. HARRIGAN, JR.

* * * * * * * * *

DIRECT EXAMINATION

* * * * * * * * *

Q. Now, Officer Harrigan, talk real loud so we can all hear you. What is your full name, sir? A. James M. Harrigan, Jr.

Q. During the month of April, 1957, where did you live? A. In the 200 block of 7th Street, Southeast.

Q. And during the month of April, 1957, where were you employed? A. At the Metropolitan Police Department.

Q. Talk louder, please. During the month of April, 1957, as a member of the Metropolitan Police Department, were you assigned to any specific duties?

A. Yes, sir. I was assigned to the Narcotics Squad in an undercover capacity.

Q. In an undercover capacity? A. Yes, sir.

3 Q. And your duties in that undercover capacity were what? A. To make buys of narcotics in this particular area I had been assigned to.

Q. Now, recalling your attention to April 2nd, 1957, on that particular date were you working as a member of the Metropolitan Police Department? A. Yes, sir.

Q. As an undercover agent for the Narcotics Squad; is that right? A. Yes, sir.

Q. And as such on that date of April 2nd, do you recall whether or not you were in the northwest section of Washington, D. C.? A. Yes, sir; I was.

Q. Can you tell us what particular section of the northwest section of Washington, D. C. you were in? A. Yes, sir; 3201 - 14th Street, Northwest.

Q. What was located there? A. An establishment by the name of Charles Grill.

Q. At what time were you there? A. At approximately 9:15.

Q. Is that a.m., p.m. or what? A. That is p.m., sir.

Q. P. M. A. Yes, sir.

4 Q. Did you go in those premises? A. Yes, I did.

Q. After entering those premises, did you meet any particular people? A. Yes, sir; I did. I met the defendants.

Q. Who did you meet in those premises on that date of April 2nd? A. Charles Grigg and Carl Tavenner.

Q. While in those premises with the two defendants, Grigg and Tavenner, did you have a conversation with them? A. Yes, I did.

Q. Relate the conversation you had with them, if you will? A. The defendant Tavenner came over to me and asked me if I would like to go in with him on some pot, meaning marihuana. And I told him I would. He said how much did I want to get. I said all I had was $10 to get a half ounce. He said, "O.K." So, defendant Grigg, defendant Tavenner and myself left Charles Cafe and drove to a place in Maryland, went out toward Bladensburg Road. While we were going out there -- we were around Bladensburg and New York Avenue -- I gave the $10 to defendant Grigg.

Q. For what? A. For the pot.

5 Q. Marihuana? A. Yes, marihuana.

Q. All right, continue. A. And then we went on out there and they were unable to get any.

Q. Where did you go out there? A. To where the Rustic Cabins is.

Q. Where is that located? A. It is on Bladensburg Road. I don't know the address.

Q. Can you tell us the nearest intersection to that place? A. Bladensburg Road and Eastern Avenue.

Q. What happened when you arrived out there? A. I waited in the car and

the defendants Tavenner and Grigg got out, and later came back and told me they were unable to get the marihuana I wanted.

Q. How long would you say they were out of the car, approximately? A. I would say approximately 20 or 25 minutes.

Q. When they returned to the car, what happened? A. They got in an --

Q. When you say they, you mean whom? A. Tavenner and Grigg, the defendants

6 Q. Keep your voice up, Mr. Harrigan. A. Yes, sir. -- And they got in the car and we left the Rustic Cabins and headed back towards Charles Grill. While we were going back, they told me that they had a couple joy sticks, meaning cigarettes. They lit those up on the way coming back, passed them back and forth and passed them to me occasionally. And I pretended to smoke them. Then we got back to Charles Cafe.

Q. Where was that located? A. 3201 - 14th Street, Northwest.

Q. What time would you say you got back there? A. I would say about 10:45.

Q. Is that p.m.? A. Yes, p.m.

* * * * * * * * *

7 Q. I believe your testimony was you had returned to Charles Grill; is that right? A. Yes, sir.

Q. What happened when you returned to Charles Grill? A. We went in and took a seat.

8 Q. When you say we, who do you mean? A. Defendants Tavenner and Grigg and myself. We took a seat and the defendant Tavenner suggested we get something to eat. I told him I didn't have any money. He then suggested we get $2 from the defendant Grigg, who had the $10 I had previously given him; and so we got $2 from him.

Q. From whom? A. From the defendant Grigg. And Carl Tavenner and myself left Charles Tavern and went across the street to get something to eat. The defendant Grigg stayed in the place.

Q. Did you have further conversations at that time with Grigg or Tavenner? A. None with Tavenner other than when we were in Charles Grill; and

defendant Grigg said he would get the marihuana later.

Q. Did you see or talk to them, that is defendants Grigg and Tavenner, any more on that date of April 2nd, 1957? A. No, sir; I did not.

* * * * * * * * *

Q. Now, on April 4, 1957, did you do anything in reference to the marihuana that Grigg told you he would get later?

MR. BOGORAD: Objection, Your Honor.

* * * * * * * * *

9 THE COURT: The witness has testified he told him he would get marihuana later. I will overrule your objection. You may answer the question.

BY MR. McLAUGHLIN:

Q. Answer yes or no. A. Yes, sir.

Q. What did you do? A. Well, I made a phone call to an apartment house at 6030 13th Place, Northwest.

Q. Whom did you make that phone call to?

MR. BOGORAD: Objection, Your Honor.

THE COURT: What is the ground for your objection?

MR. BOGORAD: There is no evidence that raises any connection between a phone call made by this witness and the defendant Grigg.

10 THE COURT: I think counsel is entitled to ask questions and establish whatever connection he can. Your objection is overruled.

* * * * * * * * *

Q. Did you talk to Donnie Sellers at that time? A. Yes, sir, I did.

Q. Did you recognize the voice as being Donnie Sellers'? A. Yes, I did.

Q. Now, what conversation -- Don't answer this question until we get a ruling -- What conversation did you have with Donnie Sellers at that time?

MR. BOGORAD: Of course, I don't know what the witness is going to say. If he is going to say this conversation related to either one of these defendants, I object.

MR. BRENNAN: I think these matters are material points in issue. The witness is being led right down the line.

THE COURT: I don't think you have touched the basis upon which objection should be made. I believe this is hearsay. I will assume you will object on that ground and sustain your objection. Go ahead.

* * * * * * * * *

11 Q. As a result of the conversation that you had with Sellers, what did you do or where did you go? A. I left my home where I made the phone call from and drove to 6030 - 13th Place, Northwest where Donnie Sellers was.

Q. That was approximately what time of day? A. I made the call at 6:30. I arrived at 6030 - 13th Place at 8:00 p.m.

Q. After arriving at those premises, did you enter those premises? A. Yes.

Q. Who did you see in there? A. Donnie Sellers and Alberta Dove.

Q. After entering those premises, did you receive anything from Mr. Sellers?

12 A. Yes, I did.

Q. What did you receive from Mr. Sellers?

MR. BOGORAD: Objection, if Your Honor please. There is still no basis laid for connecting either one of these defendants with any transaction with Mr. Sellers.

THE COURT: That is correct. I think counsel has the right to ask his questions and establish any connection he can. Go ahead, Mr. McLaughlin.

BY MR. McLAUGHLIN:

Q. I asked you what you had received from Mr. Sellers. A. I received a cellophane wrapper containing a weed, greenish colored weed. It looked like a cigarette wrapper.

MR. McLAUGHLIN: I ask that this be marked Government's Exhibit 1, for identification.

(Cellophane wrapper with contents marked Government's Exhibit No. 1, for identification.)

BY MR. McLAUGHLIN:

Q. I show you Government's Exhibit marked No. 1 for identification, Mr. Harrigan, and ask you if you can identify that? A. Yes, sir.

Q. You identify Government's Exhibit marked No. 1 as what? A. As the

13 cellophane wrapper containing the weed that Donnie Sellers handed to me in the apartment.

Q. After receiving Government's Exhibit marked No. 1 for identification, what did you do with it? A. I placed it in my pocket and left the premises and drove to my home.

Q. Did you give Mr. Sellers any order issued by the Treasurer for purposes of purchasing marihuana? A. No, sir.

Q. Did you give Mr. Sellers any form issued by the Department of the Treasury for purchasing marihuana? A. No, sir.

Q. As far as the Government Exhibit marked for identification No. 1, at the time you received it from Mr. Sellers, did it have government stamps of any kind on it? A. No, sir.

Q. After receiving Government Exhibit marked for identification No. 1 from Mr. Sellers, what did you do with it? A. I placed it in my pocket.

Q. All right. Then where did you go? A. Then I went home.

Q. All right. Then what did you do later with Government Exhibit marked for identification No. 1? A. I placed it in a cream colored envelope.

14 Q. When did you place it in the cream colored envelope? A. At home.

Q. Then what did you do with it? A. Then I marked it, initialed it, and put the time, date and place where I had received it and from whom; and then I placed it in a china cabinet, locked it and put the key in my pocket.

Q. Then what did you do? A. The following day, I met Officer Longo and Officer Foulkes at the monument grounds at about 11:00 p.m.

Q. That is Government's Exhibit No. 1, for identification? A. Yes. At that time, I turned it over to Officers Longo and Foulkes.

Q. Was Government's Exhibit No. 1, for identification, in your exclusive possession from the time you received it from Mr. Sellers until you turned it over to Officer Longo?

MR. BOGORAD: Objection; it calls for a conclusion.

THE COURT: Objection overruled. Answer the question.

THE WITNESS: Yes, it was.

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15 Q. Getting back -- I overlooked the location where Sellers had turned over the package of marihuana to you -- Was that in the District of Columbia? A. Yes, sir.

* * * * * * * * *

25 Q. Now, you referred to a person named Griggs in your testimony here today. A. Yes, sir.

Q. Do you see him in court today? A. Yes, I do.

26 Q. Will you point him out, please? A. He is seated there, second from the left.

MR. McLAUGHLIN: May the record show he identified the defendant Charles C. Grigg, Your Honor?

THE COURT: The record will so indicate.

* * * * * * * * *

Q. All you have testified to today, Officer, happened in the District of Columbia? A. No, sir.

Q. As far as the transfer of these marihuana cigarettes and tablets, did that happen in the District of Columbia?

MR. BOGORAD: Objection.

THE COURT: State the grounds for your objection.

MR. BOGORAD: He is leading the witness, Your Honor.

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27 CROSS-EXAMINATION

BY MR. BRENNAN:

* * * * * * * * *

Q. Can you recall going to Kinney's Shoe Store before 9 o'clock on April 2nd, 1957? A. Yes, sir; I believe we were near there. I don't recall going in that place.

Q. Who was with you at that time? A. Carl Tavenner.

* * * * * * * * *

28 Q. When did you first meet Carl Tavenner that night, on April 2nd?

A. I don't recall when I first met him; I might have seen him during the day.

Q. You certainly met him at 9:15 p.m. at Charles Tavern, didn't you? A. Yes, sir.

Q. At that time was the defendant Grigg there too? A. Yes, sir.

Q. Were you in the restaurant before they arrived there?

* * * * * * * * *

29 Q. Now, you have testified you met the defendants Grigg and Tavenner in Charles Restaurant at about 9 o'clock on the evening of April 2nd. What did you do at that particular time? A. I just walked in and the defendant Tavenner came up to me and started talking.

Q. You recall that? A. Yes, sir.

30 Q. You don't recall whether or not you met him earlier in the day, though? A. No, sir.

Q. Where were they sitting when you came in, sir? A. On the left-hand side as you enter the place, the establishment.

Q. Didn't you just testify a short time ago that you didn't know whether you were there prior to their arrival or not? A. That is right; yes, sir.

Q. Were they sitting at a table or sitting at the bar? A. They were sitting at a table, not the bar.

Q. Was anyone else there with them, sir? A. I don't believe, sir; I am not sure.

Q. What did they have -- Were they drinking at the time? A. They might have been; I don't recall.

Q. But you do remember the defendant Tavenner coming up and talking to you; is that correct? A. Yes, sir.

Q. When the defendant Tavenner came up to you, sir, where was the defendant Grigg? A. He stayed seated at the table.

Q. Officer Harrigan, are there two doors in Charles Tavern?

* * * * * * * * *

31 Q. So, you can recall what occurred after 9 o'clock on April 2nd, 1957; is that correct? A. Yes, sir.

Q. Can you recall what happened between 8:30 and 9 o'clock, sir? A. Very vaguely.

Q. Isn't it a fact you went into Kinney's Shoe Store and talked to the defendant Grigg? A. No, sir.

MR. BRENNAN: Your indulgence, Your Honor.

BY MR. BRENNAN:

Q. Sir, did you go to the front of the store and call the defendant Grigg out on the sidewalk in front of the store? A. No, sir.

Q. Between 8:30 and 9 o'clock on that night, who was with you? A. I believe Carl Tavenner and I were together.

32 Q. You believe, sir? A. I think so; I am not sure.

Q. Where did you and Carl Tavenner go? A. We went across the street to Kinney's Shoe Store now that you refresh my memory.

Q. Did you talk to the defendant Grigg at that time? A. Carl Tavenner called him out of the store.

Q. Do you know what the defendant Grigg was doing at that particular time? A. I think he worked at that place; I am not sure.

Q. And after the defendant Tavenner greeted you as you entered Charles Tavern, what did you thereupon do? A. Well, there was a conversation between Tavenner and myself.

Q. Standing up? A. Yes, sir.

Q. You didn't go over to the table and sit down with the defendant Grigg? A. We did go over there, yes.

Q. As the defendant Tavenner came up and approached you as you were coming in Charles Tavern, was anything said? A. Yes, we spoke.

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37 Washington, D. C.

Monday, April 28, 1958

The above-entitled matter came on for further trial before THE HONORABLE EDWARD A TAMM, Judge, United States District Court for the District of Columbia, at 10:00 a.m.

* * * * * * * * *

38 CROSS-EXAMINATION (Resumed)

BY MR. BRENNAN:

Q. Officer Harrigan, after you left the Rustic Cabin in Maryland, you returned to Charles' Grill; is that correct? A. Yes, sir.

Q. About what time was that, sir? A. About 10:30, I would say.

Q. Did the defendant Grigg and the defendant Tavener accompany you back to Charles' Grill? A. Yes, sir.

Q. Did you enter Charles' Grill at that time with the two defendants? A. Yes, sir.

39 Q. Did you have occasion to sit at the table with them at that particular tavern? A. I believe we did, yes, sir.

Q. At that time you received $2.00 from the defendant Grigg? A. Yes, sir.

Q. Prior to receiving the $2.00, sir, did you have occasion to have a glass of beer with them, or something to drink? A. I don't believe we were in that long.

Q. Did they order anything to drink? A. I don't believe so. I am not sure.

* * * * * * * * *

Q. Did you have occasion to take the defendant Tavenner to dinner or lunch at that particular time? A. We went across the street and got something to eat, yes.

Q. How long did that take, sir? A. Well, normal eating time. We didn't waste any time.

Q. Did you return to Charles' Tavern after that? A. No, I believe I left after that.

* * * * * * * * *

40 Q. Now, I ask you, sir, after you had dinner with the defendant Tavenner where did you go, sir? A. Back to Charles'.

Q. At the time you went to Charles' did you enter the restaurant? A. I honestly don't recall. I am not sure whether I went in. I think I probably stayed momentarily and then left.

41 Q. Isn't it a fact you and the defendant Tavenner sat in Charles' drinking

beer? A. No sir, I don't believe so.

Q. What was the last time you saw the defendants Grigg and Tavenner on April 2nd, sir, 1957? A. It was in Charles'.

Q. What time of the evening was that, sir? A. It was right late. I would say close to twelve o'clock.

Q. And during the time that you spent in Charles', the first part of the early part of the evening, nine o'clock or later when you returned to Charles', and again after you went to lunch and came back, you did not have anything to eat or drink in Charles, sir? A. I don't believe so. Now, I may have. I am not sure.

Q. Was there any money spent by the defendants Grigg or Tavenner on you in that particular restaurant? A. Oh, there could have been, yes, sir.

Q. During the course of the evening, sir, who was paying the checks in Charles' Tavern? A. I honestly don't recall having drank that much, or anything.

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48 REDIRECT EXAMINATION

BY MR. MC LAUGHLIN:

* * * * * * * * *

Q. Now, Officer, when did you leave the Metropolitan Police Department? A. February 25th.

Q. February 25th? A. '58, yes, sir.

Q. And you have been stationed where since? A. Fort Jackson, South Carolina.

Q. When did you come to Washington for this case? A. April 23rd.

49 Q. Now, you were questioned about, on April 2nd, as to whether or not Grigg, I believe, brought you anything to eat or drink in Charles' Tavern? A. April 2nd?

Q. Yes, you remember those questions? A. Yes, sir.

Q. Now, had you given the defendants, or any of the defendants, any money on that day? A. Yes, sir, I had.

Q. And was any of the money that you had given to the defendants used

to buy anything to eat or drink in Charles' Tavern, or Grill? A. No, sir.

Q. Was it used any place to buy anything to eat or drink? A. Yes, sir, $2.00 that I received from Grigg.

Q. Now, on April 4th, I believe your testimony was that you contacted Sellers; is that right? A. Yes, sir.

Q. Now, after you had received a marihuana from Sellers, did you have occasion to see either Tavenner or Grigg after that? A. Yes, sir, I did.

Q. And which one did you see? A. Well, first Botts and I went down to Charles' Cafe and there we saw Carl Tavenner.

50 Q. What time did you see Carl Tavenner in Charles' Tavern? A. At approximately 9:30.

Q. That was how long after you had received the marihuana from Sellers?

MR. BOGORAD: I am going to object. This is the Government's case in chief. It wasn't opened up in the defense testimony. If he intended to introduce this he should have introduced it in his case in chief.

MR. McLAUGHLIN: In view of the objection by my friend, Your Honor, may I at this time reopen the Government's case in chief to offer this evidence, because I didn't know this until the other day.

THE COURT: Is this something that was overlooked through an inadvertence?

MR. McLAUGHLIN: Well, I actually didn't know it, Your Honor, until after the defendant had testified in chief. It is something that I learned later.

* * * * * * * * *

BY MR. McLAUGHLIN:

51 Q. I believe you said -- you saw Carl Tavenner at what time? A. 9:30, approximately.

52 Q. Was that p.m. or a.m.? A. P.m.

Q. And was that after you had received the marihuana from Sellers? A. Yes, sir.

Q. And where did you see Carl Tavenner? A. In Charles' Cafe.

Q. Now, after you saw Carl Tavenner in the cafe, did there come a time

when you saw Grigg? A. Yes, sir.

Q. And when and where did you see Grigg? A. Well, Carl Tavenner and Botts and myself left Charles' and walked across the street and --

Q. You walked across the street to where? A. To the shoe store where he works.

Q. And what happened when you arrived there? A. He came out.

Q. Who came out? A. Charles Grigg -- and joined us.

Q. Now, you say he joined you. What do you mean by that? A. Well, he came out of the store and we all left that area together.

Q. Where did you go? A. To 930 Emerson Street.

53 Q. Now, 930 Emerson Street, is that the same place where you had received the marihuana from Sellers? A. No, sir.

Q. Now, did you have any conversation with Grigg or Tavenner in reference to the narcotics received from Sellers?

* * * * * * * * *

Q. I will ask you this question: When you went to the Emerson Street address, who was with you? A. Botts, Carl Tavenner, Charles Grigg, and myself.

54 Q. Now, from the time that you went to -- that is, from the time that you left Charles' Tavern and went across the street and met Grigg, were you, Grigg, and Tavenner, and this other fellow together all the time until you went to the Emerson Street address? A. Yes, sir.

Q. Right? A. Yes, sir.

Q. Now, during that period of time, did you have any conversation with the defendant Carl Tavenner as to the marihuana received from Sellers? A. Well, when we first went in to Charles' Cafe he asked me had I gotten it.

Q. Who asked you that? A. Carl Tavenner.

Q. He asked you what? A. Had I gotten the pot, the marihuana.

Q. Is that all he said? A. No, there was more.

MR. BOGORAD: Objection, Your Honor.

THE COURT: State the grounds.

MR. BOGORAD: He was leading

THE COURT: I don't think the question "Is that all he said?" is a leading question.

MR. McLAUGHLIN: I mean in reference to the marahuana.

55 MR. BOGORAD: He is now leading him, if Your Honor please.

MR. McLAUCHLIN: Pardon me, Your Honor.

THE COURT: Answer the question.

THE WITNESS: I believe that was about all that was said, yes, sir.

BY MR. McLAUGHLIN:

Q. Did you have any conversation from the time that you met Charles Grigg? A. Yes, sir. He asked me the same question.

Q. When and where did he ask you that question? A. From the time when he first came out and while we were walking over to the car, some time. I believe we were going across the street.

Q. What did he say? A. He asked me had I gotten the pot. I told him that I had the pot that he left up with Donnie Sellers.

MR. McLAUGHLIN: That is all I have.

THE COURT: Who said "the pot that he left at Donnie Sellers?"

THE WITNESS: He said, "Did you get the pot? I left it up at Donnie Sellers' for you." I told him that I had.

56 THE COURT: Have you finished?

MR. McLAUGHLIN: Yes, Your Honor.

MR. BOGORAD: I would like to have the reporter for Thursday afternoon and I would like to have the question put to this particular witness as to what he did after he received the marihuana from Sellers. I believe it will show that he went to his home.

THE COURT: I am not going to stop the trial at this time to go back and look for that testimony which the reporter does not have with her at this time. You may during the recess consult her about that.

RECROSS EXAMINATION

BY MR. BRENNAN:

Q. Can you recall your testimony as of Thursday? A. Yes, sir.

Q. Do you recall a question being put to you, "Where did you go after you received the marihuana? A. Yes. sir.

Q. What did you testify to? A. I said that I went home.

Q. Sir, in your reports to the Police Department, have you ever had occasion to mention the testimony you have just put forward? A. Yes, sir.

Q. Was it ever put in one of these particular reports to your superiors?

57 A. In a work report. That is an exhibit.

Q. Where is the work report now, sir? A. I have it in the folder outside.

(Short pause.)

MR. BRENNAN: Would you mark this for me?

THE CLERK: No. 1.

THE COURT: What is the "No. 1?"

THE CLERK: That is the one he referred to the last time, Your Honor, and I just markedit "No. 1."

BY MR. BRENNAN:

Q. Let me show you this paper writing marked "Defendants' Exhibit No. 1." A. (Reading.)

Q. Is that the official report you made to the Police Department, sir? A. Well, it is the report I made. I don't know about "official."

Q. But it is a part of the Police Department's files; is that correct, sir? A. Yes, sir.

Q. Does any place in that report state what you did on April 4th? A. Yes.

Q. What is the concluding line in that? A. "I left."

58 Q. Is there any other report that continues that particular sheet, sir? A. No, sir. As far as the date is concerned --

THE COURT: Just answer the questions.

BY MR. BRENNAN:

Q. That is for April 4th? A. Yes, sir.

Q. That is for the time you have just testified about; isn't that correct, sir? A. Yes, sir.

* * * * * * * * *

Q. After you saw the defendants Tavenner and Grigg as you testified just now, what did you do then? A. I don't understand.

Q. On Thursday afternoon you testified after receiving the marihuana you went home; is that correct? A. Yes, sir.

Q. Today you have testified you went up to the 900 block of Emerson Street; is that correct? A. Yes, sir.

59 Q. Are both statements correct? A. Well, I did go home, but not immediately.

MR. BRENNAN: Thank you, Your Honor. That is all.

MR. BOGORAD: I have no questions.

MR. McLAUGHLIN: I have nothing further, Your Honor.

THE COURT: Step down.

(The witness left the stand.)

* * * * * * * * *

DANTE LONGO

* * * * * * * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q. Now, Officer, your full name is what? A. Detective Dante Longo, Metropolitan Police.

Q. You are a member of the Metropolitan Police Department? A. Yes, sir, I am.

Q. Assigned to the Narcotics Squad; is that right? A. That's correct, sir.

Q. Were you so assigned during the month of April of 1957? A. Yes, sir, I was.

60 Q. And at that time, during the month of April of 1957, did you know a man by the name of Mr. Harrigan? A. Yes, sir, I did.

Q. Who was he, if you can tell us, during the month of April, 1957? A. He was a member of the Metropolitan Police Department assigned to the Narcotics Squad in an undercover capacity to investigate the illicit narcotics drug

traffic and the dangerous drug traffic also.

Q. I show you Government's Exhibit marked for identification No. 1 and ask you if you can identify that? A. Yes, sir, I can.

Q. And how do you identify it? A. I identify it by my initials that I placed on the small cream-colored envelope, the date and the time that I received it from Officer Harrigan.

Q. You identify that as what? A. As a small cream-colored envelope containing a cellophane wrapper containing a small amount of weed, which was turned over to me on April 5th at one p.m. at Washington, D. C., Monument Grounds, by Officer Harrigan. I went to the offices of the Narcotics Squad, performed a preliminary field test on the weed, which showed by positive color reaction the presence of marihuana. I placed it in a Treasury Department evidence envelope --

61 Q. You are ahead of me now. I show you Government's Exhibit marked for identification 1-A and ask you, Officer Longo, what did you do with the Government exhibit marked for identification "1" in reference to Government Exhibit 1-A? A. I placed the Government Exhibit No. 1 into this Treasury Department envelope 1-A, I placed Exhibit No. 1 into Government's Exhibit No. 1-A and then I sealed it by the self-sealing lock on the reverse side, placed it in the office safe on April 9th, and delivered it to the United States Chemist for his analysis.

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62 CROSS EXAMINATION

BY MR. BRENNAN:

Q. When and where did you receive the cellophane envelope containing the weed? A. That was at the Washington, D. C. Monument Grounds on April 5th, about one p.m.

Q. P.m. being the afternoon, sir? A. That's correct.

* * * * * * * * *

63 Q. Did he tell you he saw the defendant Grigg on April 2d, 1957? A. I
64 believe he did, yes, sir.

Q. Did you have occasion to ask him what he did with this particular cellophane or marihuana after he received at at 6030 13th Place, Northwest? A.

Yes, sir.

Q. What did he do with it? A. He stated that, I believe he had called me that night and told me what had happened and he stated that he was going to put it into a locked drawer or cabinet, I don't recall which, until which time he would turn it over to me.

Q. Where? A. Where? I don't understand your question. Where what, sir?

Q. You say he was going to put it in a locked cabinet or drawer. Where was the locked cabinet or drawer? A. At his home, sir.

Q. Where is his home? A. I don't recall offhand, sir.

Q. Do you know the location, Southeast, Southwest, Northwest? A. I don't recall offhand, sir.

Q. When did he tell you he was going to put it in a locked cabinet or drawer? A. The night that he received it, April 4th.

* * * * * * * * *

65 Q. Sir, what time did Officer Harrigan call you the night of April 4th, 1957? A. It was in the evening, or night hours. The time I don't remember.

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WARD C. FOULKES

* * * * * * * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

66 Q. Your full name, Officer? A. Ward C. Foulkes, assigned to the Morals Division, Metropolitan Police Department, Washington, D.C.

Q. And do you know a man by the name of Harrigan? A. I do, sir.

Q. And how did you know yim? A. He was assigned to Detective Longo and myself as an undercover officer.

Q. Of the Metropolitan Police Department? A. Yes, sir.

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DONALD W. BOWIE

* * * * * * * * *

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

68 Q. Mr. Bowie, your full name is what? A. Donald W. Bowie.

Q. And you are employed where? A. United States Treasury Department, Bureau of Narcotics.

Q. In what capacity? A. I am a Narcotics Agent.

69 Q. Now, Agent Bowie, were you present when a demand was made on the defendant Tavenner and co-defendant Sellers for the order form issued by the Secretary of the Treasury for the purpose of purchasing marihuana? A. Yes, sir, I was.

MR. BOGORAD: Objection; irrelevant and immaterial.

MR. BRENNAN: Your Honor, I have to argue a little.

THE COURT: You what?

MR. BRENNAN: I have an objection on the notice to produce. The question has been asked just now. There has been no showing that there was possession by either this defendant Tavenner or Grigg, so that the presumption that the Government is attempting to bring out right now will be in force. In other words, until there is some showing that either one of these two defendants transferred marihuana, I don't believe the question regarding order forms can be brought forth on this particular notice to produce.

THE COURT: I will sustain the objection, the first objection, in so far as the defendant Sellers is concerned. I will overrule the objection so far as the defendant Tavenner is concerned. Confine your question to defendant Tavenner.

* * * * * * * * *

70 Q. Were you present? Did you personally make a demand on the defendant Grigg for an order form issued by the Secretary of the Treasury for the sale of marihuana? A. Yes, sir, I did.

71 MR. BRENNAN: Objection, Your Honor.

THE COURT: State the grounds of your objection.

MR. BRENNAN: Your Honor, I object on the same grounds as before,

that the notice to produce is immaterial inasmuch as possession has never been placed in the defendant Grigg.

THE COURT: I will overrule the objection. Answer the question.

THE WITNESS: Yes, sir, I did.

BY MR. McLAUGHLIN:

Q. Did he produce any such form? A. Outside --

Q. I mean, did the defendants produce any form? A. No, sir, he did not.

THE COURT: Which defendant?

MR. McLAUGHLIN: Defendant Grigg.

MR. BRENNAN: I am going to object to that particular question, Your Honor, in that the defendant Grigg has eight days in which to return an order form from the time the notice is served.

BY MR. McLAUGHLIN:

Q. When did you make the demand? How long ago? A. On Grigg, sir?

72 Q. Yes. A. On December 11, 1957.

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CROSS EXAMINATION

BY MR. BRENNAN:

73 Q. Sir, have you made a search of the records of the Secretary of the Treasury to determine whether or not there was an official order form for 44 grains of marihuana? A. Have I made a search of the Treasury records?

Q. Have you searched the records; yes, sir? A. No, sir, I have not.

Q. Can you state of your own knowledge whether or not there is such a transfer order form with the stamps attached or affixed that has been turned in for this particular marihuana? A. To my knowledge, sir, no form has been turned in.

Q. So that all you are testifying here today, sir, is that you served a notice to produce upon this defendant Grigg. Is that correct, sir? A. That's true.

Q. You do not know, sir, whether there has been a return made on that particular notice to produce? A. To my knowledge, sir, no return has been made.

74 MR. BRENNAN: All right.

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REDIRECT EXAMINATION

BY MR. McLAUGHLIN:

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WILLIAM P. BUTLER

* * * * * * * * *

DIRECT EXAMINATION

78 BY MR. McLAUGHLIN:

Q. Your full name is what? A. William P. Butler.

Q. You are employed where? A. By the Internal Revenue Service of the Treasury Department as a chemist.

Q. In what capacity? A. As a chemist.

Q. You have been employed for what period of time? A. Approximately seven years.

THE COURT: The Court will recognize the witness' professional qualifications.

BY MR. McLAUGHLIN:

79 Q. I show you Government Exhibit marked for identification No. 1, Mr. Butler and ask you if you can identify that? A. Yes, sir, I can identify this envelope.

Q. You identify that as what? A. A Treasury Department locked sealed envelope that I received sealed and intact from Officer Longo.

Q. Who opened it? A. I opened the envelope.

Q. What did it contain at the time that you opened it? A. It contained a coin envelope which in turn contained a cellophane cigarette wrapper.

Q. See if it contains that now. At the time you opened Government Exhibit marked for identification No. 1-A, did it contain Government Exhibit mark- for identification No. 1 that you have in your hand now? A. Yes, sir, it did.

Q. What did Government Exhibit marked for identification No. 1 contain? A. It contained this piece of cigarette cellophane paper which held a green powdered leaf substance.

Q. Did you make an analysis of that leaf substance? A. Yes, sir, I did. I found that the contents of the cellophane were marihuana. It contained 44 grains net weight of the leaf substance.

80 Q. Can you tell us from what part of the marihuana plant that marihuana is from? A. Yes, sir, it came from the leaf portion.

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90 MR. McLAUGHLIN: Oh. I have no doubt that as far as the evidence is concerned, as far as Grigg is concerned, Your Honor, because as far as the

91 exhibit is concerned, that is, the officer giving Grigg the $8.00 for the purpose of purchasing narcotics, marihuana, and then we have Sellers later delivering the narcotics and then later the conversation between the officer Harrigan and the defendant Grigg as to the effect that you get from the substance, that you get from narcotics or pots that he left with Sellers. I think that the actions of the defendant before and after the transfer of the marihuana on the part of Sellers would indicate that Sellers was the agent of Grigg. As far as the defendant Tavenner, of course the evidence is a little weak as far as he is concerned because we have him present on the second and think he went a little bit further than that, he suggested about going to get the marihuana and they did go to Bladensburg Road and New York Avenue for the purpose of purchasing marihuana and were unable to get it. And then I believe that after the delivery on the part of Sellers, I believe that Tavenner also said, not as elaborate as Grigg, but I think Tavenner asked Harrigan if he got the pot, or something to that effect. I believe that is all we have on him now. I do appreciate it is rather slim. Of course, as we all know the law, mere presence is not enough to convict anybody.

92 THE COURT: Are you finished?

MR. McLAUGHLIN: Yes, Your Honor.

THE COURT: A' ything more with reference to this exhibit?

MR. BRENNAN: Not the exhibits, no, Your Honor.

THE COURT: I will admit Government's Exhibits 1 and 1-A only in so far as they pertain to the defendant Grigg. I will sustain the objection in so far as the exhibits relate to the defendant Tavenner.

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95 THE COURT: What do you say to the motion?

MR. McLAUGHLIN: I object to it strenuously, Your Honor. I think that we have shown enough here, we don't actually have to put the narcotics in the hands of Grigg. I think that the evidence shows that Grigg and Sellers were acting in concert, that the possession in Grigg would naturally -- that the possession of Sellers would naturally be in the constructive possession of Grigg himself. Now, as far as Grigg is concerned, as far as the order form is con-

96 cerned, I think there is a section in the United States Code there in reference to the order form, demand on the defendant for the order form, and I think there is something in there that the defendant is supposed to keep that order form in his possession for a period of about two years, and failing to produce the order form would indicate that he hasn't paid the tax stamp.

THE COURT: What testimony do you say there is in the case that there has been no payment of the tax?

MR. McLAUGHLIN: The demand for this order form. He is supposed to keep that order form for a period of two years, and failing to produce the order form would indicate that he hadn't paid the stamp, the tax. It is in there some place. Just the section I don't know. There is something in here. Where I don't know. This is it (indicating).

THE COURT: You are referring to Section 4744.

MR. McLAUGHLIN: Yes, Your Honor.

THE COURT: Very well. Anything more with reference to the defendant Grigg?

MR. BRENNAN: I would like to say this, Your Honor, on this particular point of possession. When I searched into the cases, as I did and I did quite a bit, a little bit of time ago, this is about the seventh or eighth time this case has been called, no place did I find a notice to produce on the defendant who was in actual or real possession or control or custody. In the reported cases, the defendant was arrested and at the time of his arrest was in possession of marihuana or control of the premises where the marihuana was found. This

is the only place I have seen the article on possession drawn out in such great length showing possession was in and of a particular defendant, we don't have present at this time, of course. But I don't believe the acting in concert or the circumstantial agreement was such as to put possession in the defendant Grigg so that he would have to tender a written order form with the stamps attached.

THE COURT: Are you finished?

MR. BRENNAN: Yes, Your Honor.

THE COURT: I think under the rather unusual circumstances of this case, and particularly in light of the testimony of the witness Harrigan, that the defendant Grigg inquired whether the witness Harrigan had obtained "the pot which I left" for him at Donald Sellers' establishes a possession. I believe I must deny your motion.

MR. BRENNAN: Thank you, Your Honor.

98 MR. BOGORAD: If Your Honor please, I move for a directed verdict.

THE COURT: For a judgment of acquittal.

MR. BOGORAD: Judgment of acquittal as to Counts 1 and 2 as to defendant Tavenner on the ground the Government has failed to make out a prima facie case.

THE COURT: Mr. McLaughlin.

MR. McLAUGHLIN: I think I will have to go along with that, Your Honor.

THE COURT: The Court will grant your motion.

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100 CHARLES GRIGG

a defendant, called as a witness for and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRENNAN:

Q. May it please the Court: What is your name, sir? A. Charles Grigg

Q. Mr. Grigg, will you speak so that I can hear you back here? A. Yes, sir.

Q. What is your address? A. 402 36th Street, Northeast.

Q. Directing your attention to April 2nd, 1957, did you have occasion on that date to meet Officer Harrigan? A. Yes, sir.

Q. When and where was that? A. I was working in the shoe store and Officer Harrigan and Mr. Tavenner came to the front of the shoe store and called me outside.

101 Q. What, if anything, happened at that time? A. No, sir. I went back into the shoe store and told the manager I was getting off, it was about 8:30. And we walked across the street to Charles' Grill. Officer Harrigan asked me did I know this boy that he wanted to take me out to purchase some marihuana from. I told him yes, I knew him. So he says, "Well, let's ride out there." So he gave me $10.00, so we rode out there, and we didn't see anyone and we came back to Charles' Grill, we sat down and we all three sat down and we ordered a pitcher of beer. We drank that, the three of us, and I ordered another one, and they had a glass out of that, and then he asked me for $2.00 so that Harrigan and Tavenner could go get something to eat. I gave him the $2.00 and he returned and we sat there for about another hour drinking beer, the three of us. And during the time, I spent most of the money that he had gave me drinking beer, and he said he had to leave, about 12 or 12:30, it was, he said he had to leave, and me and Tavenner sat there and drank some more beer, and then I went home.

102 Q. Now, sir, you had occasion to hear Officer Harrigan testify that you met him in Charles' Grill on April 4th, 1957? A. Yes, sir.

Q. Was that correct? A. No, sir.

Q. Did you ever have occasion to tell him, "Did you get the pot?" Or, "Is this the marihuana?" Or any speaking to him of marihuana whatsoever, after April 2nd? A. No, sir.

MR. BRENNAN: I have no further questions.

CROSS EXAMINATION

BY MR. McLAUGHLIN:

Q. Now, on April 2nd, 1957, did you know Harrigan? A. I had saw him with a couple people that I knew. I did not know him personally, no, sir.

Q. Who did you see him with? A. Roberts.

Q. And who is Roberts? A. That is all I know him by, is Roberts. I have met him a couple times, and that's about it.

Q. Where did you meet Roberts? A. On 14th Street.

Q. Where? A. In Charles'.

103 Q. In Charles' Grill? A. Yes, sir.

Q. During that time did you know that Roberts was a drug addict? A. I knew that he was taking pills. I did not know that he was a drug addict.

Q. What kind of pills? A. I had heard people say that he was taking some kind of sleeping pills, or something, or some benzedrine or something like that, sir.

Q. Do you know whether or not he had any steady employment? A. No, sir. I do not. I have only met him a couple times.

Q. When would you see him around Charles' Grill? A. He usually come in there almost every night.

Q. Would you be around there every night? A. Not every night, no, sir.

Q. Huh? A. Not every night. I used to stop in there after I got off of work and have a few beers and go home.

Q. Well, now, on April 2nd, when you met Mr. Harrigan, did he give you $10.00 to purchase marihuana? A. Yes, sir, he did.

Q. What? A. Yes, sir.

104 Q. Now, where were you going to purchase the marihuana? A. He told me that this fellow had it.

Q. What fellow? A. Do I have to give his name, sir?

Q. Sure. A. His name is Barton.

Q. What is his full name? A. They call him Doug. I do not know his full name.

Q. All right. And did you know him? A. Yes, sir.

Q. How did you know him? A. I have met him uptown.

Q. Whereabouts uptown? A. At Charles'.

Q. Well, using the words "hang around," did he hang around Charles' too? A. Not every often, sir.

Q. Did you know him as a user or peddler of marihuana? A. No, sir.

Q. Had you? A. No, sir.

Q. Prior to April 2nd, had you ever purchased any marihuana from this "Doug" before? A. No, sir.

105 Q. Well, now, on April 2nd, when Harrigan gave you the $10.00 to purchase marihuana, was it from this fellow Doug? A. Yes, sir.

Q. And you say you had never purchased any marihuana from him prior to that time? A. No, sir.

Q. And how did you know where to locate this Doug? A. Mr. Harrigan told me that Doug would probably be at the Rustic Cabins, and he had the stuff.

Q. What? A. He told me that Doug would be at the Rustic Cabins, and he may have some marihuana.

Q. Harrigan told you that; is that right? A. Yes, sir.

Q. After Harrigan told you that, and you had the $10.00 that Harrigan had given you, where did you go? A. We went to the Rustic Cabins.

Q. When you say "we," you mean who? A. Mr. Tavenner, Mr. Harrigan and myself.

Q. And where is the Rustic Cabins located? A. It is on Bladensburg Road in Maryland.

Q. What time would you say you arrived there? A. It was about 10 -- close to 10 o'clock.

106 Q. In the evening? A. At night, yes, sir.

Q. Night? A. Nighttime, yes, sir.

Q. Now, is that in the vicinity of Bladensburg Road and New York Avenue, Northeast? A. No, sir.

Q. How far is it from New York Avenue? A. It is about two or three miles.

Q. All right. Now, what happened when you arrived at the Rustic Cabins? A. Tavenner and I went inside. We did not see anyone we knew. We looked around and we came back to the car.

Q. Now, at that time, and prior to that time, when you received the $10.00

from Mr. Harrigan, did you know that he was a member of the Metropolitan Police Departme nt? A. No, , sir, I did not.

Q. Now, when you went in the tavern, you say you were unable to locate Doug? A. Yes, sir.

Q. Then what did you do? A. I got back inthe car with Harrigan and we drove back to Charles'.

107 Q. Well, now, you say that Harrigan gave you the money? A. Yes, sir.

Q. And asked you to buy it from Doug? A. Yes, sir.

Q. And further told you that Doug had the stuff? A. Yes, sir.

Q. Now, why didn't you tell him to buy it himself? A. Well, I figured that he didn't know Doug and Doug wouldn't sell it to him.

Q. Oh, you had to be known by Doug in order to buy it from him? A. I guess so.

Q. What? A. Yes, sir, I guess so.

Q. Well, now, my next question is, had you bought it from Doug before? A. No, sir, I did not know Doug even had it.

Q. You knew possession of Marihuana was a violation of the law, didn't you? A. Yes, sir.

Q. Now, when you returned from the tavern to Harrigan, what did you tell him? A. I told him that Doug was not there.

108 Q. Then what happened? A. We drove back to Charles".

Q. Did you give him back his $10.00? A. No, sir, I did not.

Q. When you got back in Charles' Tavern, what happened? A. We ordered a pitcher of beer and I paid for it out of the $10.00, and we drank it.

Q. Out of Harrigan's $10.00? A. Yes, sir.

Q. Did Harrigan sit there and help you drink the beer? A. Yes, sir, he did.

Q. Then he asked you for $2.00? A. Yes, sir.

Q. Did he tell you why he was asking you for $2.00? A. He said he wanted to go across the street and buy some food for Mr. Tavenner and hisself.

Q. That left you holding $8.00 belonging to Mr. Harrigan; is that right?

A. No; after I paid for the beer, the beer was eighty-five cents and I gave the waitress a fifteen-cent tip, that left $7.00.

Q. Of Harrigan's money? A. Yes, sir. Then I ordered another pitcher of beer, and he drank part of that before he left to go across the street, and I paid that out of it, and that left $6.00.

109 Q. That left you with $6.00 belonging to Harrigan; is that right? A. Yes, sir.

Q. How long did you and Harrigan sit in Charles' Tavern drinking beer? A. After they had come back from across the street, we sat there until 12 or 12:30 drinking beer.

Q. Midnight? A. Yes, sir.

Q. When you left the tavern, how much money did you have belonging to Harrigan? A. I had about $2.00 left.

Q. Now, during all this time that these pitchers of beer were being purchased, Harrigan was right there, wasn't he? A. Yes, sir.

Q. Now, did Harrigan pay for any of that beer? A. No, sir, I paid for everything that was ordered that night?

Q. You paid for everything that was ordered out of Harrigan's money? A. Yes, sir.

Q. In other words, at no time did Harrigan handle his own money in the Charles' Tavern? A. No, sir, he did not.

110 THE COURT: As you know, ladies and gentlemen of the jury, you should not discuss the facts in the case with anyone during the luncheon recess.

(Thereupon, at 12:30 o'clock p.m., a recess was had until 1:45 o'clock p.m.)

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111 CHARLES GRIGG

* * * * * * * * *

CROSS EXAMINATION
(Resumed)

* * * * * * * * *

Q. Now, when you left the Charles' Grill, how much of Harrigan's money did you have? A. It was about $2.00.

Q. About $2.00? A. Yes, sir.

Q. What time did you leave Charles' Grill? A. I left Charles' about one or one-thirty.

Q. Well, now, was April 2nd the first time that you were ever in the company of Officer Harrigan? A. I had saw him before and I was introduced to him by Robert Botts, the man that they call Botts, and that's about it.

112 Q. In other words, you were never in his company drinking beer prior to April 2nd of 1957; is that right? A. Not at the same table, sir. I have saw him in Charles' a couple times drinking beer.

Q. I mean at the same table. A. No, sir, not at the same table; no, sir.

Q. Now, after April 2nd of 1957 -- when you left Charles' Tavern, would be about what time? A. It was about 1:30.

Q. A.m.; in the morning? A. Yes, sir.

Q. Now, did you have an occasion to see Harrigan again after that? A. No, sir. sir.

Q. Did you ever return the money to him? A. No.

Q. What was your purpose in keeping Harrigan's money? A. Well, after I had spent most of it, he got up and left before we did, and me and Tavenner sat there and drank some more beer, and then I went on home, and the next time I saw him was December 25th downstairs on the fourth floor in the courtroom.

Q. So you never returned the remainder of his money to him; is that right? A. No, sir, I did not.

* * * * * * * * *

113 Q. Now, do you know Donald Sellers? A. Yes, sir, I do.

Q. How long had you known Donald Sellers? A. I had met him occasionally for about six months, I would say.

Q. Was that six months prior to April 2nd of 1957? A. Yes, sir.

114 Q. Do you understand that? A. Not quite, sure. I wish you would repeat it.

Q. You say you knew Sellers approximately six months; is that right? A. Yes, sir.

Q. Was that six months just prior to April 2nd of 1957? A. Yes, sir.

Q. And during the period of six months prior to April 2nd of 1957, where would you see Sellers, Donald Sellers? A. Around 14th and Kenyon, maybe down at the White Tower on 14th Street, or either in Charles'.

Q. Would you see him in Charles' Grill? A. Yes, sir.

Q. And during those times, would you be in his company? A. Not exactly, sir. Sometimes he would sit with me and sometimes he would be sitting at another table.

Q. During that period of time did you consider Donald Sellers a friend of yours? A. Yes, sir, I did.

Q. What? A. Yes, sir.

115 Q. Now, isn't it a fact that prior to April 2nd, 1957, and the six months prior to that date, that you and the defendant Carl Tavenner and Donald Sellers were in one another's company practically every night in the week? A. No, sir.

Q. Would say three nights out of the week? A. No, sir, I wouldn't say that.

Q. How often during that period of time would you be in the company of Donald Sellers and the defendant Carl Tavenner? A. Maybe once a week, or once every other week.

Q. What? A. Sometimes it would be a couple of weeks and I wouldn't see him.

Q. During that period of time did you know where Carl Tavenner lived? A. Yes, sir.

Q. Where did he live? A. He lived right off of 14th Street, I think it is. I don't know the street, sir, but I could go there.

Q. Would you go to his house during that period of time? A. No, sir.

Q. Did you know where Donald Sellers lived during that period of time? A. Yes, sir.

116 Q. Where did he live? A. He lived on Emerson Street, on the corner, way uptown on Emerson Street, right off of Georgia Avenue, in the corner house.

Q. Didn't he live in the 900 block of Emerson Street? A. Yes, sir.

Q. Isn't it a fact -- didn't Tavenner live there, too? A. No, it isn't.

Q. Had you ever, during that period of time, been in that apartment with Sellers and Tavenner at the same time? A. No, sir.

Q. No? A. No, sir, I have never been in there.

Q. Who lived in the 3000 block, I believe, of 13th Place, Northwest? A. Alberta Dove.

Q. Had you ever been in that apartment? A. No, sir.

Q. Isn't it a fact that you and Sellers would go to that apartment quite often? A. No, sir, it is not.

Q. What? A. No, sir.

Q. No? A. No.

117 Q. Did you ever, from April 2nd up until the present day, return any money that Harrigan had given to you on April 2nd, 1957, to Harrigan? A. No, sir.

* * * * * * * * *

THE COURT: Will you come to the bench?

* * * * * * * * *

118 MR. BRENNAN: About 15 minutes, Your Honor. By the way, Your Honor, I will move for my directed verdict of acquittal at the end particularly with the idea that the presumption of guilt by possession and no explanation of it, went out the window with the defendant taking this stand.

THE COURT: I think that there is an element of credibility in the case in this posture that requires a determination as to who is telling the truth, the defendant Grigg or the witness Harrigan. I think this is a question of fact for the jury. I will deny your motion. How much time do you want?

MR. BOGORAD: About ten minutes, if Your Honor please. I will renew my motion for a directed verdict on Counts 5 and 6.

THE COURT: The motion will be denied.

122 JUDGE'S CHARGE TO THE JURY

* * * * * * * * *

123 With reference to the first two counts of the indictment, which charge a violation of the law relating to the transfer of marihuana on April 4th, the Court has directed a verdict in favor of the defendant Tavenner. The Court has ruled

as a matter of law that the Government has not placed sufficient evidence in the case to hold the defendant Tavenner on the first and second counts of the
124 indictment. The Court has dismissed these counts of the indictment in so far as they pertain to this defendant. So that you have before you in the first two counts of the indictment only the case of Charles C. Grigg.

What does the indictment charge that Grigg did?

The first count of the indictment charges that on or about April 4, 1957, within the District of Columbia, Charles C. Grigg transferred about 44 grains of marihuana to James M. Harrigan, not in pursuance of a written order of said James M. Harrigan on a form issued for that purpose as provided by law.

The essence, then, of this first count of the indictment is that Grigg transferred marihuana to Harrigan not in pursuance of a written order on a form required by law.

The second count of the indictment charges with reference to the same transaction that on or about April 4, 1957, within the District of Columbia, Charles C. Grigg, being a transferee of marihuana and required to pay a transfer tax imposed by Section 4741a of Title 26 of the United States Code, obtained about 44 grains of marihuana without having paid such tax. The second count of the indictment, then, briefly charges that Grigg on or about April 4, 1957, obtained marihuana without having paid any tax thereupon.

Two questions may arise in your minds at this point, first, as to why this indictment relates to a transfer of marihuana not on a written form, and the second, why it pertains only to its possession or receiving as transferee without having a tax paid thereupon.

125 I want to explain to you, as I have explained to other jurors, that the Federal Government, the Government of the United States, is a Government of delegated powers. The Federal Government has no delegated power which enables it directly to control the sale and the transfer of narcotic drugs. The Federal Government, though, has very broad, very extensive taxing powers, and as a result of these taxing powers, the Congress of the United States has enacted a large number of statutes which establish a very complicated and involved tax system relating to the transfer of narcotic drugs. These indictments,

the first two counts of this indictment, are predicated upon these tax statutes which I am going to read to you in a moment, but that is the basic reason why the nature of these charges is that the transfer was made not on a written order form as prescribed by law, and that there was no tax paid upon the transfer of the marihuana.

Remember, then, that in the first two counts of the indictment, you have only the defendant Charles C. Grigg, and only the transaction relating to the alleged transfer of marihuana.

I must point out to you also with reference to these two counts that when a person does a single act which violates two or more laws, the Government is entitled to prosecute the actor, the person who does the acts, for the violation of each of the laws even though there is alleged or charged to be but a single transaction.

126 So the Government has charged the defendant Grigg with violations of two separate laws growing out of a single transaction.

* * * * * * * *

127 Now, let me read for you the laws under which these counts of this indictment are returned. The first count of the indictment relates to the charges that Grigg transferred marihuana to Harrigan not on an order form issued for that purpose as provided by law. The law upon this point is very simple. The United States Code provides that:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under certain sections to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate."

So that this section of the statute makes it illegal to transfer marihuana except upon a written order of the person to whom such marihuana is transferred on a form prescribed by the Secretary of the Treasury or his delegated representative.

The second count of the indictment is drawn under a section of the United States Criminal Code which provides that:

128 "It shall be unlawful for any person who is a transferee of marihuana required to pay the transfer tax imposed by Section 4741(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after

reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed thereunder."

* * * * * * * * *

131 In determining whether the Government has established the charges against these defendants, you must consider and weigh the testimony of all of the witnesses who have appeared before you. You are the sole judges of the credibility of these witnesses. This means that you must determine which of the witnesses you are going to believe and to what extent you are going to believe those witnesses. In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to take into consideration the demeanor of the witness on the witness stand, his appearance and manner of testifying, whether the witness impresses you as having an accurate mem-
132 ory and recollection of the facts about which he is testifying, whether the witness indicates any favor or prejudice toward the Government or toward the defendants and, of course, that very important question of whether the witness has any interest in the outcome of the case.

In addition, you have the right in the jury room to draw upon all of the personal experiences of your lives and to bring into your consideration of the credibility of these witnesses any factors that you have heretofore found important in making the day-to-day determinations which you have had to make as to whether particular people are telling you the truth or are telling you falsehoods. If you believe that any witness wilfully testified falsely as to any material fact concerning which fact that witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

With reference to the defendant Grigg testifying before you as a witness, you have the right to determine the credibility that you will give to his testimony. The law makes this defendant a competent witness in his own behalf. You nevertheless have the right to take into consideration his situation, his interest in the

133 result of your verdict, and all of the circumstances which surround him, and you should give to his testimony such weight as in your judgment it is fairly entitled to receive.

* * * * * * * * *

134 There is a defense offered in this case which is legal and rather technical in its nature, that is, the defense of entrapment. Entrapment is the conception and the planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, the persuasion, or fraud, of the officer. The Court charges you that the defense of entrapment, if established, is a good and valid defense, and if established to the satisfaction of the jury in accordance with the Court's charge to you, the defendants are entitled to a verdict of not guilty. The law is that the mere fact that officials or employees of the Government may afford opportunities or facilities for the commission of an offense does not justify the acquittal of the defendant on the ground of entrapment. Artifice and stratagem may be employed

135 to apprehend those engaged in criminal enterprises. But if the jury finds that the criminal design originated with officials of the Government, and that they implanted that criminal design in the mind of an innocent person who would not otherwise have committed the offense, the jury is justified, if they so find, in returning a verdict of not guilty. The law is well settled that decoys and informers may be used to entrap criminals and to present opportunities to one intending or willing to commit a crime, but decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. Thus when the criminal design originates not with the defendant, but is conceived in the minds of the Government officials, and the accused is by persuasion, deceitful representation or inducement, lured into the commission of a criminal act which he would not have otherwise committed, the jury may, if they so find, return a verdict of not guilty.

* * * * * * * * *

136 With reference to the defendant Grigg, and the first two counts of the indictment, your verdict upon each count may be either guilty or not guilty.

You must reach a separate and independent verdict upon each count for each defendant who is named in those counts. Consequently on the first count of the indictment as to the defendant Grigg your verdict may be either guilty or not guilty. On the second count of the indictment with reference to the defendant Grigg your verdict may be either guilty or not guilty.

* * * * * * * * *

138 THE COURT: Do you have any other objection to the charge as given?

MR. BRENNAN: No, sir.

THE COURT: Very well.

* * * * * * * * *

THE COURT: There is a section of the United States Criminal Code which relates to the Government's position on Counts 1 and 2 of the indictment, that is, the charge against Grigg that he acted in concert with one or more other people in this alleged transaction relating to marihuana, and the provision is as follows:

139 "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

* * * * * * * * *

(Upon return of the jury to the courtroom, the following proceedings were had:)

* * * * * * * * *

140 THE CLERK: What say you as to the defendant Charles C. Grigg on Count 1 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: What say you as to defendant Charles C. Grigg on Count 2 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the defendant Carl F. Tavenner on Count

5 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: What say you as to the defendant Carl F. Tavenner on Count 6 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your foreman says your verdict in this case is that the defendant Charles C. Grigg is guilty on Count 1 and guilty on Count 2, and that the defendant Carl F. Tavenner is guilty on Count 5 and guilty on Count 6, and that is your verdict, so say you each and all?

(The jury indicated affirmation.)

* * * * * * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14635

157

CHARLES C. GRIGG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

EDWARD P. TROXELL,
Principal Assistant United States Attorney.

CARL W. BELCHER,
Assistant United States Attorney.

No. 14635

COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of appellee the following question is presented:

May an accessory, who aided and abetted the sale of marihuana by receiving the money for the drug and placing the drug in the hands of another for delivery, be found guilty of the offenses of—

(a) transferring the marihuana not in pursuance of a written order form, required by law; and of

(b) being a transferee of such marihuana without having paid the transfer tax imposed by law?

485135—58——1

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14635

CHARLES C. GRIGG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and two other persons, Tavenner and Sellers, were charged on July 29, 1957, in a six-count indictment with violations of the narcotic statutes. The first count charged that appellant and the others on April 4, 1957, committed the offense of transferring 44.0 grains of marihuana to James M. Harrigan not in pursuance of a written order form required by law. The second count charged that appellant and the others on April 4, 1957, committed the offense of being transferees of 44.0 grains of marihuana without having paid the required (26 U. S. C. 4741a) transfer tax. Appellant pleaded not guilty to the two charges on August 1, 1957. Counts three to six, inclusive, did not include appellant.

The case came on for trial in the District Court on April 24, 1958, and on April 28, 1958, the jury returned a verdict finding appellant guilty of counts one and two of the indictment (R. 140). A motion for new trial and for arrest

of judgment, filed by appellant on May 2, 1958, was denied on May 16, 1958. Appellant was sentenced on June 18, 1958, to serve five years under count one and from twenty months to five years on count two. Such sentences were directed to run concurrently.

At the trial, the evidence established that Harrigan, a police officer, met appellant and codefendant Tavenner at a Grill located at 3201 Fourteenth Street NW. (R. 3, 4, 29). Harrigan had a conversation with appellant and Tavenner during which Tavenner asked Harrigan if he wanted some "pot," which the parties understood to mean marihuana (R. 4). Harrigan gaven ten dollars to appellant (R. 4, 5, 101, 103, 105, 108) for marihuana. Harrigan, appellant and Tavenner then left the Grill or Cafe at 3201 Fourteenth Street NW., and drove to a place near Bladensburg Road (R. 4, 101, 105). It was the understanding of Harrigan and appellant at that time that the ten dollars would be used for purchasing marihuana (R. 5, 101, 103, 105, 107). After appellant, Tavenner and Harrigan arrived at the Bladensburg Road location, appellant and Tavenner left Harrigan at a place identified as the Rustic Cabins (R. 4, 105). They were absent twenty to twenty-five minutes (R. 5). When appellant returned, they told Harrigan they could not get any marihuana there (R. 5, 101). Tavenner, appellant and Harrigan then returned to the Grill at 3201 Fourteenth Street NW. (R. 6).

Thereafter, Harrigan asked appellant to return to him two dollars of the ten dollars previously handed to appellant by Harrigan (R. 8, 39, 101). Appellant retained the remaining eight dollars (R. 108) and never returned any portion of the eight dollars to Harrigan (R. 110, 112, 113, 117). Appellant testified that the sum of eight dollars which remained of the money given to him by Harrigan was expended by him at the Grill for beer and tips to a waitress on April 2, 1957 (R. 108, 109, 111). Upon leaving the Grill, according to appellant, two dollars of the eight dollars remained (R. 109, 111). Harrigan did not handle the eight dollars at any time (R. 110). Harrigan testified, however, that only the two dollars received back from appellant was used for

food (R. 49). None of the eight dollars was spent by either of the defendants at the Grill on that date for food or drink (R. 49).

Two days later, that is, April 4, 1957, Harrigan made a telephone call to Sellers at 6030 Thirteenth Place NW. (R. 9, 10). Sellers was a friend of appellant (R. 113, 114, 115). The latter and Tavenner had associated with Sellers on a weekly or biweekly basis for a period of six months next preceding April 2, 1957 (R. 113–115). As a result of the call made by Harrigan to Sellers, Harrigan drove to 6030 Thirteenth Place NW. (R. 11), which is in the District of Columbia (R. 15, 26), and there Harrigan saw Sellers and a woman named Alberta Dove. From Sellers Harrigan received a cellophane wrapper containing a greenish colored weed (R. 12, 13), which, upon chemical analysis, was found to weigh 44 grains and consist of a green powdered leaf substance identified as marihuana (R. 79, 80). A demand was made upon appellant for a written order form as required by law (R. 70, 71), but he did not produce the requested form (R. 71, 73); such demand was made for the form on December 11, 1957. Moreover, no such order form was given to Sellers at the time the package was received from Sellers (R. 13). No order form as required by law was submitted for the marihuana here involved (R. 73). The package of marihuana received from Sellers contained no Government stamps of any kind (R. 13).

After receiving the marihuana from Sellers, Harrigan said that he went home (R. 13) and placed the marihuana in a china cabinet (R. 14, 25, 64), later delivering the marihuana to Officers Longo and Foulkes (R. 14, 62). On redirect examination, Harrigan stated that after he obtained the marihuana from Sellers (R. 52), he saw Tavenner at the Charles Cafe (R. 49) and that Tavenner, a person named Botts and Harrigan left the Cafe and walked across the street to the shoe store where appellant worked (R. 52). Appellant came out of the shoe store which was across the street from the Grill located at 3201 Fourteenth Street NW. in the District of Columbia. Whereupon appellant, Tavenner, Botts and Harrigan went to a place on Emerson Street (R. 53). Prior to going to the

shoe store Tavenner asked Harrigan the following question "had I gotten the pot, the marihuana" (R. 54). After Tavenner and Harrigan had met appellant on this occasion (April 4, 1957), the latter made a similar inquiry of Harrigan. The following is the colloquy (R. 55) regarding appellant's inquiry at that time:

> "Q. Did you have any conversation from the time that you met Charles Grigg?
>
> A. Yes, sir. He asked me the same question.
>
> Q. When and where did he ask you that question?
>
> A. From the time when he first came out and while we were walking over to the car, sometime. I believe we were going across the street.
>
> Q. What did he say?
>
> A. He asked me had I gotten the pot. I told him that I had the pot that he left up with Donnie Sellers.
>
> Mr. McLAUGHLIN. That is all I have.
>
> The COURT. Who said 'the pot that he left at Donnie Sellers'?
>
> The WITNESS. He said, 'Did you get the pot? I left it up at Donnie Sellers' for you.'
>
> I told him that I had."

When first questioned about what happened after Sellers delivered the marihuana to him, Harrigan said he went home (R. 13). Later in his testimony he said that he met Botts, Tavenner and appellant at which time Tavenner and appellant inquired as to whether Harrigan had obtained the marihuana (R. 54, 55). Harrigan's official report reflected that after he received the marihuana from Sellers, he merely "left" Sellers (R. 57). Harrigan explained that when he said he went home earlier he meant that he did so but not "immediately" (R. 59). In the meantime, Harrigan met Tavenner, Botts and appellant (R. 52) at which time he received the inquiries from Tavenner and appellant regarding whether he had procured the marihuana (R. 52, 54, 55).

The codefendant, Carl F. Tavenner, was found guilty of Counts five and six of the indictment (R. 140) after judgment

of acquittal (unopposed by the Government) was granted on Tavenner's motion as to counts one and two (R. 98). The codefendant, Donald V. Sellers, was tried subsequently and was adjudged guilty of counts one, two, three and four on July 31, 1958 (Judgment of the Court).

STATUTES INVOLVED

18 U. S. C. § 2 provides:

> *Principals.*—(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

26 U. S. C. § 4742 (a) provides:

> *Order forms.*—(a) *General requirement.* It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U. S. C. § 4744 (a) provides:

> *Unlawful possession.*—(a) *Persons in general.* It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained. Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand

by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741 (a).

22 D. C. C. § 105 provides:

> *Persons advising, inciting, or conniving at criminal offense to be charged as principals.*—In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 908.)

SUMMARY OF ARGUMENT

Appellant arranged for delivery by a third person of 44.0 grains of marihuana to a police officer without the required order form and stamps after accepting payment for such drugs from the officer. Appellant indicated that he was the culpable source of the drugs by his inquiry addressed to the officer regarding whether the officer had received the marihuana which he, appellant, had left with the third person for the officer. The endeavor to attack the credibility of the officer fails in view of the record of testimony, the trial court's instructions, the jury verdict and the precedents holding to the proposition that issues of credibility are matters of fact for the jury.

ARGUMENT

I

The Evidence Supports the Verdict

In urging that the evidence does not sustain the conviction, appellant asserts that part of the testimony of the witness Harrigan contains what are erroneously claimed to be contradictions. A reading of the entire record, nonetheless, fails to re-

fleet any contradictions or even inconsistencies in such testimony.

Appellant denied guilt of the offense charged. Yet, he admitted that on April 2, 1957, he met Officer Harrigan (R. 100), accepted ten dollars from the latter to be used for the purchase of marihuana (R. 101, 106) and endeavored that day to procure marihuana for the officer (R. 101). Appellant admitted the retention of eight dollars of the original sum received from Harrigan (R. 108), saying that he spent the eight dollars save two dollars for beer and tips (R. 109–111). Appellant admitted that Harrigan did not handle the eight dollars (R. 110) and that he never returned the money to Harrigan (R. 112, 113, 117). Appellant admitted knowing Sellers (R. 113) for a period of six months prior to April 1957, saying that he saw Sellers frequently during that period (R. 115). Appellant did not furnish the order form required by law (R. 70, 71, 73) and the marihuana was delivered to the officer without the stamps required by law (R. 13).

Harrigan testified that he gave the money to appellant for marihuana and that on April 4, 1957, he received the marihuana from Sellers. Appellant, according to Harrigan, indicated that he was the prime source of supply of the marihuana when on April 4, 1957, he asked Harrigan if he had "gotten the pot" (R. 55) from Sellers. In response to the court's question (R. 55) Harrigan said: "He said, 'Did you get the pot? I left it up at Donnie Sellers' for you.'"

Appellant contends that Harrigan testified inconsistently about what happened after he received the marihuana from Sellers. Harrigan said (R. 13) that he went home after he received the marihuana. Later, he testified (R. 54–55) that he went to see Tavenner and Grigg at which time they inquired if the latter had received the marihuana, using the expression "pot." Harrigan in his reports to the police said "I left" (R. 57) after receiving the marihuana. Harrigan also testified that he delivered the marihuana to Officers Longo and Foulkes (R. 14) after keeping it in a cabinet at home overnight (R. 13, 64). He did not go home immediately (R. 59), thus permitting him adequate time to see appellant and Tavenner (R. 52–55).

Accordingly, the record fails to reflect any inconsistencies in the testimony of Harrigan. Assuming, arguendo, that there were such at the outset, they were fully explained by his statement that he did not go home immediately.

Appellant, testifying in his own behalf, denied procuring the marihuana for Harrigan; yet he admitted retaining eight dollars of Harrigan's money given to him for the purchase of marihuana. It also appears that appellant inquired of Harrigan as to whether the latter had received the marihuana left for him by the former with Sellers.

The jury was instructed fully and properly on the subject of credibility of witnesses (R. 131–133)[1]. Having seen and heard the witnesses and having been adequately instructed on the points of law applicable to credibility, the verdict of

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[1] "In determining whether the Government has established the charges against these defendants, you must consider and weigh the testimony of all of the witnesses who have appeared before you. You are the sole judges of the credibility of these witnesses. This means that you must determine which of the witnesses you are going to believe and to what extent you are going to believe those witnesses. In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to take into consideration the demeanor of the witness on the witness stand, his appearance and manner of testifying, whether the witness impresses you as having an accurate memory and recollection of the facts about which he is testifying, whether the witness indicates any favor or prejudice toward the Government or toward the defendants and, of course, that very important question of whether the witness has any interest in the outcome of the case.

"In addition, you have the right in the jury room to draw upon all of the personal experience of your lives and to bring into your consideration of the credibility of these witnesses any factors that you have heretofore found important in making the day-to-day determinations which you have had to make as to whether particular people are telling you the truth or are telling you falsehoods. If you believe that any witness wilfully testified falsely as to any material fact concerning which fact that witness could not possibly be mistaken, you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

"With reference to the defendant Grigg testifying before you as a witness, you have the right to determine the credibility that you will give to his testimony. The law makes this defendant a competent witness in his own behalf. You nevertheless have the right to take into consideration his situation, his interest in the result of your verdict, and all of the circumstances which surround him, and you should give to his testimony such weight as in your judgment it is fairly entitled to receive."

the jury should not now be subject to attack. *Bates* v. *United States*, 95 U. S. App. D. C. 57, 59, 219 F. 2d 30[2] (1955); *Ballard* v. *United States*, 99 U. S. App. D. C. 101, 102, 237 F. 2d 582 (1956)[3].

In *Wigfall* v. *United States*, 97 U. S. App. D. C. 252, 253, 230 F. 2d 220 (1956), this Court said:

> "In our jurisprudence the credibility of witnesses and the derivation of the truth from oral testimony are reposed in the hearer of the witnesses. Demeanor, inflection and gesture, both on direct examination and under cross examination, are elements in those determinations. Sole witnesses are commonplaces of the courtroom. The jury chooses what to believe and whether the proof thus believed is convincing beyond a reasonable doubt. The present case is a typical one for the application of those fundamental rules.
>
> "This court has held several times that the verdict of the jury must be sustained if there is substantial evidence to support it. In the case at bar we think it is quite clear that if the jury believed the woman complainant it could have been convinced of Wigfall's guilt beyond a reasonable doubt. If the wallet

---

[2] "The case at bar presents a simple and direct issue of credibility. The testimony was in flat conflict. The jurors had to believe either the appellant or the two officers. If they believed the officers there was no reasonable doubt of guilt. This was clearly a jury function, and the trial judge properly left the issue to it."

[3] "Error is charged in the court's refusal to give a familiar instruction requested by the defendant, which suggested certain criteria to be used in determining the credibility of witnesses, such as observing demeanor and considering possible personal interest or bias. In its charge, the court told the jury they were the sole judges of the facts, and further said:

> 'You are the sole judges of the credibility of witnesses. It is for you and you alone to determine whether to believe any witness and the weight to be attached to any witness' testimony as well as the extent to which the witness should be credited.'

It is perhaps better practice to give the requested fuller instruction, even though its standards for judging credibility probably would be adopted anyway by the jury; but we cannot say its omission here was so prejudicial as to require reversal. A trial judge is not required to instruct in the language selected and suggested by the defendant."

> was in the purse and the purse was closed with a secure catch, and if the owner felt the purse twice being pressed against her left hip, and if Wigfall was then hulking over her and no one else was on that side of her, and if immediately thereafter the wallet was gone, reasonable minds might well believe guilt beyond reasonable doubt within the framework of those proven circumstances." [Footnote omitted.]

It is submitted that the court here more than complied with the standards set forth in the *Bates*, *Ballard*, and *Wigfall* cases, *supra*. Since counsel for appellant below did not object to the instruction (R. 138, 139), he may not now raise the point. Fed. R. Crim. P. 30; *Walker* v. *United States*, 96 U. S. App. D. C. 148, 151, 223 F. 2d 613 (1955); *Villaroman* v. *United States*, 87 U. S. App. D. C. 240, 184 F. 2d 261, 262–263 (1950)[4]; *Berry* v. *United States*, 102 U. S. App. D. C. 353, 253 F. 2d 875 (1958).

II

Appellant controlled the possession of the marihuana

It is clear that appellant controlled the possession of the marihuana transferred to the police officer, Harrigan (R. 54–55), and that appellant received the money for the marihuana so transferred (R. 4, 101). The balance of the money was never returned to Harrigan (R. 105, 112, 113, 117). The constructive possession of appellant prior to the delivery of the marihuana to Harrigan, as thus established at trial, is sufficient to support the verdict. *Jackson* v. *United States*, 94 U. S. App. D. C. 71, 72, 214 F. 2d 240, *cert. denied*, 347 U. S. 1021 (1954); *Rosenberg* v. *United States*, 13 F. 2d 369 (9th Cir. 1926); *Robinson* v. *United States*, 53 App. D. C. 96, 288 Fed. 450; *Mullaney* v. *United States*, 82 F. 2d 638, 642 (9th Cir. 1936); *Williams* v. *United States*, 55 App. D. C. 239, 241–242, 4 F. 2d 432.

Appellant had such dominion over and control of the marihuana in question here within the meaning of the *Jack-*

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[4] Reversed on other grounds.

son, Rosenberg, Robinson, Williams and *Mullaney* cases, *supra*, as to indicate clearly violation of the pertinent statutes.

III

Appellant aided and abetted the principal actor

The court instructed [6] the jury in the language of the governing statute [8] to the effect that whoever aids, abets, counsels, commands, induces or procures the commission of an offense is punishable as a principal and that whoever causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. Since no objection was voiced at the trial regarding this charge,[7] appellant may not complain now.

The record discloses that appellant aided, abetted and procured the commission of the offense.[8] Having done so he is responsible as a principal. That would have been the case even had the principal actor (Sellers) not been convicted. *Gray* v. *United States*, decided October 3, 1958, —— U. S. App. D. C. ——, citing *Meredith* v. *United States*, 238 F. 2d 535, 542 (4th Cir. 1956) and *Colosacco* v. *United States*, 196 F. 2d 165, 167 (10th Cir. 1952).

In the *Meredith* case, *supra*, the present Chief Judge Sobeloff, sitting with the late Chief Judge Parker and Associate Judge Soper, observed in part as follows (238 F. 2d at 542):

> "Under this provision,[9] conviction of the principal actor is not a prerequisite to conviction of the aider and abettor. It need only be established that the act constituting the offense was in fact committed by someone [citing cases]."

However, in this case below but in a separate trial proceeding, the "principal actor," Sellers, was convicted [10] for the offenses charged in counts one and two of the indictment, the same charges as to which appellant was found guilty.

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[6] R. 188–189.
[8] 18 U. S. C. § 2; *compare* 22 D. C. C. § 105.
[7] R. 136, 139.
[8] R. 55, 101, 105, 110, 113, 117.
[9] 18 U. S. C. § 2.
[10] Judgment of the Court, in record, dated July 31, 1958.

IV

There was no error in the resumption of direct examination of the witness Harrigan

Appellant cites *Kuhn* v. *United States*, 24 F. 2d 910, 914 (1928) in support of his contention that it was error in this case for the trial court to permit the resumption (R. 50) of direct examination by the Government of the witness Harrigan. The decision, however, fails to support such contention.

In the *Kuhn* case a number of persons were charged with conspiracy to export arms and munitions of war to China. The witness Borresen, was named as an accomplice in the conspiracy. In fact, he had previously entered a plea of guilty to a charge of bringing some of the same arms into China when he was before the United States Court in China. Subsequently, in the *Kuhn* case, Borresen testified in chief. The trial court permitted the Government to recall Borresen for further direct examination and thereupon he gave testimony as to certain instructions regarding the shipment of the arms which he claimed were given to him by one or more of the defendants, both before and after he reached China. The instructions concerned delivery of guns about sixty miles south of Hong Kong. The Court said in part (24 F. 2d at 914):

> "* * * Permission to recall the witness was clearly within the sound discretion of the court. *Austin* v. *United States* (C. C. A.) 4 F. (2d) 774; *Marron* v. *United States* (C. C. A.) 8 F. (2d) 251; *Horowitz* v. *United States* (C. C. A.) 12 F. (2d) 590. And we do not find that such discretion was abused. That the testimony was relevant and material cannot be doubted, and that it may have been measurably inconsistent with his other testimony affected its weight, but did not render it incompetent. Like considerations apply to the manner in which the testimony was elicited and given.
>
> "The other contention made under this branch of the case is that it was error to permit Borresen to testify as to declarations made by defendants, particularly

> Chew Fook Gum, in the course of the alleged conspiracy, upon the ground, as argued, that Borresen's direct testimony (which, if believed, undoubtedly made out a case of conspiracy) was so 'discredited' that it could not be accepted as sufficient for that purpose. But, even though he was an accomplice, and may have made some inconsistent statements, the trial court could with entire propriety accept his testimony as making a prima facie case, and proceed accordingly in the reception of other proofs, leaving the ultimate question of his credibility and of the weight of all the evidence to the jury under appropriate instructions."

It is clear that the *Kuhn* case, cited by appellant, supports the action of the trial court, herein, permitting the resumption of the direct examination of the witness Harrigan by the Government. Note that the witness Harrigan was not recalled. The resumption of direct examination occurred immediately (R. 50) after the completion of cross-examination (R. 48). In the *Kuhn* case the witness was recalled.

It is clear that the resumption of direct examination here was not an abuse of discretion.

V

Mesarosh case is distinguishable

Appellant relies heavily on the decision in *Mesarosh, et al.* v. *United States,* 352 U. S. 1 (1956), in support of his contention that the testimony of the witness Harrigan should be disregarded. That case, however, is clearly distinguishable from the present situation.

In the *Mesarosh* case, the Solicitor General requested remand for a determination by the District Court of the credibility of the principal witness, Mazzei. The Solicitor General set forth his reasons for making such a request—including references to a number of demonstrated falsehoods by the witness Mazzei under oath. The Supreme Court reversed the conviction and remanded for new trial.

None of the conditions demonstrated by the Solicitor General in the *Mesarosh* case are present here. There has been no

showing that Harrigan ever testified falsely in this proceeding or any other action or appearance. Moreover, no representative of the United States has had occasion to indicate lack of confidence in the veracity of Mr. Harrigan. Certainly, no such showing appears of record in this case nor has it been shown by appellant from sources aliunde.

The jury below saw the witnesses, heard the testimony and was instructed fully on the law relating to credibility of witnesses (R. 131–133). No objection to the court's instructions was voiced (R. 138, 139)[11] and the jury found appellant guilty (R. 140). The verdict, therefore, should stand. *Bates* v. *United States, Ballard* v. *United States, Wigfall* v. *United States,* cited *supra.*

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
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EDWARD P. TROXELL,
Principal Assistant United States Attorney.
CARL W. BELCHER,
Assistant United States Attorney.

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[11] *Villaroman* v. *United States,* 87 U. S. App. D. C. 240, 184 F. 2d 261, *reversed on other grounds; Berry* v. *United States,* 102 U. S. App. D. C. 353.

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